1981

Sweetwater Properties et al v. Town of Alta, Utah : Supplemental Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

SWEETWATER PROPERTIES, SBC INVESTMENT COMPANY and BLACKJACK TRUST,	:	
Plaintiffs-Respondents,	:	
vs.	:	Case No. 17064
TOWN OF ALTA, UTAH, a municipal corporation,	:	
Defendant-Appellant.	:	

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS

The Court, at argument in this matter, raised a question regarding applicability to the present case of the Court's newly published opinion in Western Land Equities, Inc., v. City of Logan, No. 16321 (September 5, 1980). Appellants have taken the opportunity to file a supplemental brief regarding Western Land Equities, and Respondents reply herewith.

The Status of Approvals and Permits to Develop

The District Court specifically found herein (Findings of Fact Nos. 8, 9, 10) that Salt Lake County has preliminarily approved a development of 200 residential units for respondents'

property according to the development plat in evidence, requiring the project to be built in stages, which must be separately finally approved, and has finally approved the first stage of 15 units and granted initial construction (grading and foundation) permits therefor. Appellant cound not and did not offer any contrary evidence below, and raised no objections below to Findings Nos. 8, 9, and 10. These findings are now conclusive.

The state of approval of Respondents' project is therefore at least as advanced as that of the projects in Western Land Equities and Contracts Funding and Mortgage Exchange v. Maynes, 527 P.2d 1073 (Utah 1974), the ruling extended by Western Land Equities. In Contracts Funding, a conditional approval appears to have been indicated, though not formally granted as in the present case. In Western Land Equities, no approval was granted, conditional or final. The rule of the cases is that when the landowner has taken the steps necessary to entitle him to approval under existing regulation, he cannot be denied the right to proceed with his project on the basis of subsequent regulation.

Respondents have plainly taken all the steps necessary to entitle their project to be approved and to proceed. The uncontraverted evidence thereof is that the project has in fact been approved, and the County is prepared to proceed. Appellant's argument that it should now be entitled to interfere with the project because respondents have in hand only the construction

permit for the foundations of the first 15 units is entirely disposed of by the Court's language in Western Land Equities:

> Tests currently followed by the majority of states are particularly unsatisfactory in dealing with the large multistage projects. The threat of denial of a permit at a late stage of development makes a developer vulnerable to shifting governmental policies and tempts him to manipulate the process by prematurely engaging in activities that would establish the substantial reliance required to vest his right to develop when inappropriate.

Page 11, Slip Opinion.

Under Western Land Equities and Contracts Funding, the scope of respondents' project and of its vested development right is defined by the County's preliminary approval of 200 units according to plans and drawings in evidence. Appellant's claim to a right to interfere with the project because it is proceeding to final approval in stages is directly contrary to at least Western Land Equities.

The Intent and Affect of the Alta Policy Declaration

Western Land Equities and Contracts Funding cannot be distinguished upon the facile ground that they involved a single government changing its regulations, rather than the attempt of a second government to override the continuing judgment of a first. Cases in which a second government attempts to prohibit development under approvals and permits granted by a first government, uniformly sustain the landowners' right to proceed, even against claims that he should have anticipated that a new government might be installed having different views. See, e.g., Sakolsky v. Coral Gables, 157 So.2d 433

(Fla. 1963); Boise City v. Blazer, 572 P.2d 892 (Idaho 1977) (denying an annexing city's claim that it could refuse a permit to complete development commenced before the territory was incorporated). The rule is plainly supported by the following language in Western Land Equities:

> It is incumbent upon a city, however, to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of the current city officials for that of their predecessors.

Slip Opinion, pp. 12-13.

Notwithstanding appellant's current headlong flight from the plain facts, it is not subject to quibble that the intended and the actual affect of enactment of Alta's Policy Declaration is to prevent respondents proceeding with County approval of a 200 unit project. Despite the claim, out of one side of appellant's mouth, that its Policy Declaration is nothing more than a statement of its willingness to annex respondents' property, there is the admission, out of the other side of appellant's mouth, that if it could annex it would not tolerate a development on the property many times the size of the present Town. If forbidding the development approved by the County is not the purpose of the Policy Declaration, there is no purpose to the present appeal, since, despite appellant's willful misconstruction of the judgment below, the judgment does not prohibit the Town from annexing respondents' property, or from amending its Policy Declaration to clean up its deficiencies or from enacting another policy declaration regarding respondents'

property. The judgment simply forbids use of the Policy Declaration, or a subsequent one, or any resulting annexation to interfere with respondents' presently vested right to complete their project.

The intended and actual affect of the enactment of the Alta Policy Declaration is precisely the same as if action had been taken specifically voiding existing zoning, or existing permits and approvals based on present zoning. It is precisely the affect forbidden by Western Land Equities and Contracts Funding.

Pendency of Contrary Regulations

Western Land Equities indicates that a landowner will not be able to secure the advantages of present zoning of his land if he makes application for development approval after the city or county publicly proposes new zoning for the property that would restrict the development intended:

> Furthermore, if a city or county has initiated proceedings to amend its zoning ordinances a landowner who subsequently makes application for a permit is not entitled to rely on the original zoning classification.

Slip Opinion, p. 12.

Appellant supposes that there is some advantage for its position in this holding because "the Sweetwater developer obtained a "foundation" permit for only 15 condominium units prior to the Alta Declaration and that 15 units permit was obtained in a highly questionable maneuver by Sweetwater in direct anticipation of and only two hours before the Town

Council meeting of Alta to consider adopting the proposed Policy Declaration." (Appellant's Supplemental Brief, p. 5). Even allowing license for advocacy, about the most that can be said for this interpretation of the law and the facts is that it is irresponsible.

The Western Land Equities rule cited applies when the landowner applies for development approval after new restrictions are proposed. Here it is admitted (found below and unchallenged there or an appeal) that respondents applied (in early June, 1979) for approval of their project long before Alta adopted its Proposed Policy Declaration (in late July, 1979). The Proposed Policy Declaration states these facts on its face. It was adopted in response to the initiation of County proceedings to approve respondents' project.

Of course, there is not a scintilla of evidence that there was anything questionable about the way in which respondents obtained approvals and permits from the County.

Alta would have the Court hold that with the mere passage of a proposed policy declaration, a landowner is bound to halt proceedings to obtain County approvals and permits or lose the advantage of any approvals obtained. Under such a theory, a Town could freeze forever all development activity on its borders by mere passage of a proposed policy declaration - in direct contravention of §10-2-418, which applies development restrictions only after enactment of a final declaration.

Alta would impose upon landowners a responsibility, upon

pain of losing all development approvals for their land, of anticipating whenever a proposed policy declaration is adopted at least (1) that the proposed policy declaration will be finally enacted entirely without changes (see §10-414(2)), (2) that there will be no protest of the final declaration by an "affected entity" before the Boundary Commission (see §10-2-408), or that any protest will fail, or that if there is an unsuccessful protest that it will not be followed by a successful appeal (see §10-2-412), (3) that a majority of other affected landowners will consent to the annexation proposed (see §10-2-416), and that no other "legal or factual barriers" will be discovered (see §10-2-418), and, finally, (4) that once the property is annexed, the municipality will restrict the owner's intended development of the land. This is hardly the fairness and predictability of government regulation required by Western Land Equities.

Compelling Public Interest

Alta's Supplemental Brief asserts that it is a compelling public interest furthered by the new annexation statute that unincorporated territory within one-half mile of municipalities be annexed. The claim obviously goes much too far. Even if it were correct, however, it would not assist Alta's position.

Nothing in the judgment appealed from prevents annexation of respondents' property, under the present Policy Declaration (if it is found substantively adequate) or a new one, so long

as the procedure is not used to interfere with respondents' currently vested right to develop.

Alta's real claim is that this statute furthers a compelling public interest in restricting development approved within a half mile of a town, if the town authorities disagree with the county's approval. It should be enough to say that there is no indication of such an intention anywhere in the statute.

The purpose of the development restrictions of §10-2-418 is simply to forstall new approvals of development, which approvals could result in creation of further county improvement districts, where a municipality is willing to annex and provide services through its existing system. There is no indication in the statute that it is intended to provide municipalities with a veto power over county decisions that particular developments are consistent with the public health, safety and welfare. The public interest in health, safety and welfare is accomodated under this statute, as under all others, by committing the decision to the first government which takes jurisdiction, and permitting any other interested government to participate in the appropriate proceedings.

That is precisely what is happening here. Alta has expressed its concerns to the County, and the County has given them full consideration. The County has reserved the right to further consider environmental and other concerns as the project progresses, and to dispose of them at the appropriate stage.

The public interest in health, safety and welfare is being fully protected in the ordinary way.

CONCLUSIONS

Western Land Equities and its predecessor Contracts Funding forbid a municipality to interfere with a landowner's right to proceed with development of land within the municipality by enactment of restrictions subsequent to the landowner's application for approval, where the landowner has complied with regulations in effect at the time of his application. The rule applies likewise to counties. Alta admits the rule, but claims that it should not bind municipalities as to territory outside municipal boundaries. That is, the Town should be permitted to do in unincorporated territory what it is plainly forbidden to do in its unincorporated territory, and what the County is plainly forbidden to do in the unincorporated territory in question.

The Town's position cannot be adopted without gutting the rule of Western Land Equities and Contracts Funding. Nothing in the legislation in question indicates that the legislature, which must be presumed to have known of the Contracts Funding rule at the time of the enactment, intended such a fundamental change in the State's law without some clearly expressed mandate. There is none. The judgment below should be affirmed.

DATED this 20th day of September, 1980.

E. Craig Smay
Attorney for Respondents

MAILING CERTIFICATE

This is to certify that the undersigned mailed a true and correct copy of the foregoing Supplemental Brief of Respondents to Robert S. Campbell, Jr. and James P. Cowley, 310 South Main Street, 12th Floor, Salt Lake City, Utah 84101, Attorneys for Defendant-Appellant, by placing said copy in the U.S. Mail, postage prepaid this 2nd day of September, 1980.

E. Craig Smay